

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 ZACHERY CRABTREE,

4 Plaintiff,

5 v.

6 KIMBERLY WANKER,

7 Defendant.  
8

3:19-cv-00755-MMD-CLB

**REPORT AND RECOMMENDATION**  
**OF U.S. MAGISTRATE JUDGE<sup>1</sup>**

9 Before the court is Plaintiff Zackery Crabtree's ("Crabtree"), application to proceed *in*  
10 *forma pauperis*<sup>2</sup> (ECF No. 4), and his amended *pro se* civil rights complaint<sup>3</sup> (ECF No. 3).  
11 For the reasons stated below, the court recommends that Crabtree's *in forma pauperis*  
12 application (ECF No. 4) be granted, and that his amended complaint (ECF No. 3) be  
13 dismissed with prejudice.

14 **I. *IN FORMA PAUPERIS* APPLICATION**

15 A person may be granted permission to proceed *in forma pauperis* ("IFP") if the  
16 person "submits an affidavit that includes a statement of all assets such [person] possesses  
17 [and] that the person is unable pay such fees or give security therefore. Such affidavit shall  
18 state the nature of the action, defense or appeal and affiant's belief that the person is entitled  
19 to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000)  
20 (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

21 The Local Rules of Practice for the District of Nevada provide: "Any person who is  
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23 <sup>1</sup> This Report and Recommendation is made to the Honorable Miranda M. Du, United  
24 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant  
to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

25 <sup>2</sup> The court construes Crabtree's signed financial certificate as an application to  
26 proceed *in forma pauperis* (ECF No. 4.).

27 <sup>3</sup> The court finds the amended complaint (ECF No. 3) to be the operative complaint in  
this case.

1 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].  
2 The application must be made on the form provided by the court and must include a financial  
3 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

4 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some  
5 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.  
6 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to  
7 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,  
8 339 (1948).

9 A review of the application to proceed IFP reveals Crabtree cannot pay the filing fee;  
10 therefore, the court recommends that the application (ECF No. 4) be granted.

## 11 **II. SCREENING STANDARD**

12 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A  
13 provides, in relevant part, that "the court shall dismiss the case at any time if the court  
14 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim  
15 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is  
16 immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an  
17 arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This  
18 includes claims based on legal conclusions that are untenable (e.g., claims against  
19 defendants who are immune from suit or claims of infringement of a legal interest which  
20 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
21 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th  
22 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same  
23 standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure  
24 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal  
25 where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl.*  
26 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

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1 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*  
 2 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must  
 3 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that  
 4 the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679  
 5 (2009). The complaint need not contain detailed factual allegations, but must offer more  
 6 than “a formulaic recitation of the elements of a cause of action” and “raise a right to relief  
 7 above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing  
 8 the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not  
 9 represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal  
 10 construction may not be used to supply an essential element of the claim not initially pled.  
 11 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se*  
 12 plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless  
 13 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103,  
 14 1107 (9th Cir. 1995).

### 15 **III. SCREENING OF AMENDED COMPLAINT**

16 In his amended complaint, Crabtree sues Defendant District Court Judge Kimberly  
 17 Wanker under 42 U.S.C. § 1983. (See ECF No. 3.) The amended complaint alleges the  
 18 following: Defendant Wanker conspired with the District Attorney, Nye County Sheriff, and  
 19 defense counsel to violate Nevada Revised Statute 453.3405.<sup>4</sup> (*Id.* at 1.) Crabtree alleges  
 20 Defendant Wanker “violated her oath of office,” by releasing Crabtree from jail for the sole  
 21 purpose of providing “substantial assistance” in accordance with NRS 453.3405. (*Id.*)  
 22 Crabtree alleges this was done in violation of the law and proceeds to make various  
 23 allegations related to the legality of his plea agreement. (*Id.* at 2-4.) While Crabtree does  
 24 not assert a claim for relief in his amended complaint, a review of his original complaint  
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26 <sup>4</sup> NRS 453.3405 is titled: Trafficking in controlled substances: Suspended sentence  
 27 limited; eligibility for parole; reduction or suspension of person assisting in investigation or  
 prosecution of any offense; consideration of factors by court.

1 shows the following requested relief: punitive damages in the amount of \$100,000, vacating  
2 his criminal convictions, and taking him off lifetime supervision. (ECF No. 1-1 at 4.)

3 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority  
4 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d  
5 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)).  
6 The statute “provides a federal cause of action against any person who, acting under color  
7 of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286, 290  
8 (1999), and is “merely . . . the procedural device for enforcing substantive provisions of the  
9 Constitution and federal statutes.” *Crompton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).  
10 Claims under § 1983 require the plaintiff to allege (1) the violation of a federally-protected  
11 right by (2) a person or official who acts under the color of state law. *Anderson*, 451 F.3d at  
12 1067.

13 However, § 1983 is not a backdoor through which a federal court may overturn a  
14 state court conviction or award relief related to the fact or duration of a sentence. Section  
15 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts  
16 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they differ  
17 in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (quoting  
18 *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take care to prevent  
19 prisoners from relying on § 1983 to subvert the differing procedural requirements of *habeas*  
20 *corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at 486-87; *Simpson v.*  
21 *Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner challenges the legality or  
22 duration of his custody, raises a constitutional challenge which could entitle him to an earlier  
23 release, or seeks damages for purported deficiencies in his state court criminal case, which  
24 effected a conviction or lengthier sentence, his sole federal remedy is a writ of *habeas*  
25 *corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481; *Wolf v.*  
26 *McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Simpson*,  
27 528 F.3d at 692-93. Stated differently, where “a judgment in favor of the plaintiff would

1 necessarily imply the invalidity of his conviction or sentence,” then “the complaint must be  
2 dismissed unless the plaintiff can demonstrate that the conviction or sentence has already  
3 been invalidated.” *Heck*, 512 U.S. at 487.

4 It is apparent that Crabtree is challenging the constitutionality of his state court  
5 criminal conviction. Consequently, he must demonstrate that his conviction has been  
6 overturned to proceed in an action under § 1983. As he has not done so, his sole relief is a  
7 *habeas corpus* action.

8 Additionally, the court notes that Defendant Kimberly Wanker is absolutely immune  
9 from suit under § 1983. See *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988)  
10 (“Judges are absolutely immune from damage actions for judicial acts taken within the  
11 jurisdiction of their courts.... A judge loses absolute immunity only when [the judge] acts in  
12 the clear absence of all jurisdiction or performs an act that is not judicial in nature.”).

13 The court, therefore, recommends that the complaint be dismissed with prejudice, as  
14 amendment would be futile. See *Cato*, 70 F.3d at 1107.

#### 15 **IV. CONCLUSION**

16 For the reasons articulated above, the court recommends that Crabtree’s application  
17 to proceed *in forma pauperis* (ECF No. 4) be granted, and his amended complaint (ECF No.  
18 3) be dismissed with prejudice.

19 The parties are advised:

20 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
21 Practice, the parties may file specific written objections to this Report and Recommendation  
22 within fourteen days of receipt. These objections should be entitled “Objections to  
23 Magistrate Judge’s Report and Recommendation” and should be accompanied by points  
24 and authorities for consideration by the District Court.

25 2. This Report and Recommendation is not an appealable order and any notice  
26 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District  
27 Court’s judgment.

1 **V. RECOMMENDATION**

2 **IT IS THEREFORE RECOMMENDED** that Crabtree's application to proceed *in forma*  
3 *pauperis* (ECF No. 4) be **GRANTED**; and

4 **IT IS FURTHER RECOMMENDED** that Crabtree's amended complaint (ECF No. 3)  
5 be **DISMISSED WITH PREJUDICE**.

6 **DATED:** 2/28/2020.

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**UNITED STATES MAGISTRATE JUDGE**